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In The

Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH, ET AL.,

Petitioners,

vs.

ARIZONA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS YNIGUEZ AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING

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INTEREST OF AMICUS CURIAE

This case concerns Article XXVIII of the Arizona Constitution which declares English to be the "official language" of the state and requires all Arizona officials and employees performing Government business to "act" only in English.[1] In effect, Arizona seeks to impose "English Only" requirements on sovereign Indian tribes located within the boundaries of the State,[2] including one of the largest American Indian tribes, the Navajo Nation.

The Navajo Nation is a federally recognized Indian tribe, comprised of more than 200,000 members and occupying approximately 25,000 square miles of trust lands spanning 11 counties in three states, Arizona, New Mexico, and Utah.[3] The Navajo Nation exercises nearly exclusive jurisdiction within its territorial boundaries, and provides a wide variety of governmental services throughout its jurisdiction.

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[1] Section 1(2) states that English "is the language of the ballot, the public school and all government functions and actions."

[2] According to the 1994-1995 "Arizona State Land Department Annual Report," twenty percent of the land in Arizona is Indian trust lands.

[3] Navajo Nation Division of Community Development, *1990 Census Population and Housing Characteristics of the Navajo Nation* (1993), at 28.

The United States recognized the authority of the Navajo Nation over lands reserved for the Navajo people in the Treaty of June 1, 1868, United States-Navajo Tribe, 15 Stat. 667. *See* also, *Williams v. Lee*, 358 U.S. 217 (1959).

Article XXVIII directly impacts the free speech of members of the Navajo Nation who are elected to political offices in Arizona and those who are employed by the State, including teachers in public schools located in the Navajo Nation or in nearby towns. Article XXVIII also has the effect of preventing the Navajo Nation from carrying out its own laws and policies concerning the preservation and utilization of the Navajo language.[4] It has

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[4] 10 N.N.C. § 111 **Education in Navajo language**

> The Navajo language is an essential element of the life, culture and identity of the Navajo People. The Navajo Nation recognizes the importance of preserving and perpetuating that language to the survival of the Nation. Instruction in the Navajo language shall be made available for all grade levels in all schools serving the Navajo Nation. Navajo language instruction shall include to the greatest extent practicable: thinking, speaking, comprehension, reading and writing skills and study of the formal grammar of the language.

1994 Navajo Nation Long-Range Navajo Language Goals, established by Resolution EC-MY-46-94 (May 27, 1994), of the Education Committee of the Navajo Nation Council:

> It is the policy of the Navajo Nation to work towards the acceptance of the Navajo language in all areas of contemporary Navajo life, and the prohibition of the Navajo language in none.
>
> Navajo will be taught and used in schools as a **living** language; students, staff, and parents will use Navajo as a language of instruction, communication and interaction.

Navajo Nation President Executive Order, "Relating to the Usage of the Navajo Language as the Language of Instruction at all Navajo Nation Head Start Facilities," July 31, 1995.

destructive cultural consequences similar to the devastating results of an earlier (now repudiated) federal Indian policy of assimilation.[5] The enforcement provision offers sweeping opportunities for punishing Navajo public service employees who speak Navajo while performing Arizona government business.[6]

Contract relationships between Arizona and the Navajo Nation will be necessarily implicated by Article XXVIII, e.g., development of child support enforcement agreements for payments under the Arizona Health Care Cost Containment System ("AHCCCS"), A.R.S. § 36-2901 *et seq*. and Title XIX of the Social Security Act, 42 U.S.C.A. § 301 *et seq*. In many cases, the State contracts with the Navajo Nation to provide these services. When the Navajo Nation acts as an agent for the state to provide certain services it does so to insure that impacted sectors of the Navajo Nation effectively receive this assistance.

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[5] Education was considered the cornerstone of assimilation, the 19th century federal policy which was premised on "civilizing" young American Indians by forcing them to speak English and to adopt the ways (including the language) of the predominant ("civilized") culture. "Thus began a federal initiative in cultural genocide, an explicit policy of remaking the Indian in the white man's image." James Crawford, *Hold Your Tongue: Bilingualism and the Politics of "English Only"*, Addison-Wesley Publishing Co. (1992), at 44.

[6] **Enforcement; Standing.**

> Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

Article XXVIII acts to destroy the effectiveness of the Navajo Nation in providing such services, particularly to those members of the Navajo Nation who would otherwise be denied assistance because of language issues.

The Navajo Nation is filing this *Amicus Curiae* brief pursuant to United States Supreme Court Rule 37(4), which does not require the consent of the parties.

STATEMENT OF FACTS

Long before the first English-speaking immigrants arrived, American Indian nations were the aboriginal occupants of this land.[7] It is estimated that between 500 and 1,000 indigenous tongues were spoken in North America when white settlers arrived.[8] This number has been dramatically reduced since that time.[9] However, the Navajo language is currently utilized by the vast majority

[7] Quoting President Franklin D. Roosevelt, who once remarked, "all of our people all over the country, all except the pure-blooded Indians, are immigrants or descendants of immigrants, including those who came over on the Mayflower," the 9th Circuit noted that, "this country has historically prided itself on welcoming [other] immigrants with a spirit of tolerance and freedom. . . . " *Yniguez, et al. v. Arizonans for Official English, et al.*, 69 F.3d 920, 948 (9th Cir. 1995).

[8] Crawford, at 34-35.

[9] "Linguistic self-determination is also a matter of growing concern to American Indians. While an estimated 206 indigenous languages still survive in the United States, a majority of these are in extremely poor health, spoken by dwindling groups of elders." Crawford, at 245.

of the Navajo people, including many elders who speak only Navajo, and is an essential element of the government, culture and customs of the Navajo Nation.[10]

Ironically, because Article XXVIII has the effect of discouraging usage of the Navajo language, it has the potential for destroying an invaluable asset in the preservation of democracy. Thus, rather than protecting democracy (a stated goal of the Article's proponents), it may very well have the opposite effect. Utilization of indigenous languages, and the Navajo language in particular, has a distinguished history in the military annals of the United States. Combat communications using indigenous languages were an essential aspect of the success of the United States military efforts during World War II.[11] Arizona, New Mexico, and the United States have all acknowledged the critical contributions of Navajo servicemen in the United States Marines ("Code Talkers") who effectively used the Navajo language in coded communications during World War II.[12] Unlike English language codes, the Navajo code was never broken by

[10] Navajo Nation Division of Community Development, *1990 Census Population and Housing Characteristics of the Navajo Nation* (1993).

[11] Alison R. Bernstein, *American Indians and World War II*, Univ. of Oklahoma Press, (1991), at 46-49.

[12] This recognition includes the following proclamations:

Navajo Code Talker's Day in Arizona on January 30, 1982, proclaimed by the Arizona Governor. *Navajo Times*, p. 14, 1-13-82.

Navajo Code Talker's Day in New Mexico on April 10, 1982, proclaimed by the New Mexico Governor. *Navajo Times*, 4-14-82.

National Navajo Code Talkers Day (August 14th – the anniversary date of the Japanese surrender) proclamation

Japanese cryptologists and was a vital element of the United States military success in the Pacific.[13]

The Navajo language is integral to an understanding of Navajo culture.[14] Language is the vehicle through which history, religion, custom and tradition are taught, and thus is not a neutral instrument, but a conveyor of values.[15] Navajo religious ceremonies require a profound

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signed by the President of the United States on July 28, 1982. McClain, *Navajo Weapon*, pp 235-237.

[13] See generally, Sally McClain, *Navajo Weapon*, Books Beyond Borders (1994); Doris Paul, *The Navajo Code Talkers*, Dorrance Publishing Co. (1973).

[14] "We, the Navajo people, were very fortunate to contribute our language as a code for our country's victory. For this I strongly recommend we teach our children the language our ancestors were blessed with at the beginning of time. It is very sacred and represents the power of life." Kee Etsicitty, Code Talker, 3rd Division, quoted in McClain at v.

[15] "Navajo elders taught me that language is the controlling factor in one's life. It is sacred, and that requires Navajos to become familiar with their language and how words are used. . . . 'Power' is a linguistic issue. In the Navajo language, words are 'powerful,' but it is wrong to use them to exert power over others." Unpublished Paper by Esther Yazzie, Navajo Language Interpreter for the United States District Court, District of New Mexico, "Native Americans in Native Studies: Toward the End of Marginalization" (Spring 1995).

"Coercive anglicization has taken more from Native Americans than a set of linguistic skills. It has isolated them from cultural resources they need to define themselves, leaving many unprepared to enter a wider society, still far from color-blind, that is likely to reject them regardless of their English-speaking ability." Crawford at 248.

On June 19, 1996, a Memorandum of Understanding was signed by the Navajo Nation and the Federal National Mortgage

understanding of the language in order to accurately describe both to whom a prayer is offered, and the appropriate supplication.[16] Similarly, an explanation of the complex Navajo family clan system, through which individuals understand and define who they are, also requires Navajo language proficiency.[17] Navajo is the primary language of the Courts of the Navajo Nation and the principal means of conveying traditional values and customary law.[18]

Article XXVIII forbids Navajo teachers in all public schools from speaking in the Navajo language to Navajo school children, and their families, except to teach Navajo as a "foreign" language or as a means of teaching English. As a result, Navajo children could be deprived of

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Association ("Fannie Mae"), implementing a housing initiative in the Navajo Nation with standard mortgage and note forms which require an oral Navajo language translation whenever notice is given. Fannie Mae thus recognized the critical importance of the Navajo language in understanding these documents and the rights and responsibilities conveyed through them. Resolution IGRMY-116-96 of the Intergovernmental Relations Committee of the Navajo Nation Council (5-20-96).

[16] "The Navajo language was given to us by our Great Spirit and we are to use that [language] to communicate to Him through prayer." Harry Tome, Navajo elder and member of the Native American Church, "NAC to Promote, Preserve, Protect Our Culture," *Navajo Times*, June 20, 1996, at A-5.

[17] Robert Yazzie, Chief Justice, Supreme Court of the Navajo Nation, " 'Life Comes From It': Navajo Justice Concepts," 24 N.M. L. Rev. 175, at 182 (Spring 1994).

[18] Tom Tso, Former Chief Justice, Supreme Court of the Navajo Nation, "The Process of Decision Making in Tribal Courts," 31 Ariz. L. Rev. 225-36 (1989). "Navajos have survived since before the time of Columbus as a separate and distinct people. What holds us together is a strong set of values and customs, not words on paper."

critical opportunities to speak and to be spoken to in their own indigenous language and through that language, to learn the teachings of the Navajo culture. The resulting message to Navajo children (i.e., Navajo is a second class language, school is a place where you must speak English, not Navajo, use of the Navajo language must be restricted) is similar to the boarding school teachings of the late 19th and early 20th centuries, the ultimate result of which is a modern day initiative in cultural genocide.[19]

Currently, two-thirds of Navajo school children attend public schools in the Navajo Nation, or in border towns.[20] A number of state offices with largely Navajo service populations are located in the Navajo Nation[21] or in nearby towns.

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[19] "Off-reservation federal boarding schools were founded in 1879. . . . [as a means of completely removing Indian youth] from the family and the barbarism of tribal life. . . . Anthropologist Peter Farb described the boarding school experience:

> The children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives, or friends. Anything Indian – dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited.

Felix S. Cohen's *Handbook of Federal Indian Law*, Michie Co. (1982 Ed.) at 140, n. 126 (citations omitted).

[20] Navajo Division of Education, *Statistics on Navajo (Diné) Education 1994-1995*, (May 1995) at 164-168. There are 57 public schools in the Navajo Nation (33 of them in the Arizona portion of the reservation).

[21] According to Navajo Communications Co., Window Rock, Navajo Nation (Arizona), there are 29 state and county offices located in the Navajo Nation, providing services primarily to Navajos.

The Navajo Nation government has repeatedly expressed opposition to "English Only" initiatives, both at the state and federal levels.[22] Federal policy affirmatively supports Indian control of Indian education and the preservation of indigenous languages as an integral aspect of tribal self-determination.[23] Although one of the stated exceptions to Article XXVIII is "to comply with other federal laws,"[24] there is no exception for compliance with tribal laws. The blend of federal Indian law and

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[22] **Navajo Nation Council Resolution CJY-34-88:** Opposing Passage of Proposition 106 which would mandate English as the official language of the State of Arizona (7-29-88); **Navajo Nation Council Resolution CO-98-95:** Requesting the United States Congress to Oppose the Proposed "English-Only" Legislation . . . and to Support the Concurrent "English Plus Resolution," H.Con.Res. 83. . . . (10-24-95); **Intergovernmental Relations Committee Resolution IGRJA-9-96:** Strongly Opposing the "English Only" Legislation and the Amendments Intended to have Native Americans accept such legislation. . . . (1-22-96); **Navajo Nation Council Resolution CAP-35-96:** Opposing proposed Congressional Actions Implementing "English Only" Policies (4-18-96).

[23] 25 U.S.C. § 2011: **Policy for Indian control of Indian education**:

> (a) **Facilitation of Indian control**. It shall be the policy of the Secretary [of the Interior] and the Bureau [of Indian Affairs], in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education.
>
> (b) **Consultation with tribes**. (1) All actions under this Act shall be done with active consultation with tribes.

Native American Languages Act of 1990, 25 U.S.C. § 2901, *et seq.*

[24] Arizona Constitution, Article XXVIII, § 3(2)(b).

policy makes the exception for such compliance difficult to interpret. In addition, the combination of tribal, federal and state law issues in the provision of services to American Indians, makes the likelihood of misinterpretation of the statutory exception to the detriment of the Navajo people and other Indians in Arizona almost inevitable.

SUMMARY OF ARGUMENT

When first encountered by Europeans, American Indian people were sovereign under the same principles of natural law upon which our democratic form of government is founded. From the earliest contact, European powers, and later the United States, recognized the national character of Indian tribal governments through treaties. Treaties between the United States and Indian tribes,[25] and implementing federal legislation,[26] provide that the internal affairs of Indian people shall remain exclusively within the jurisdiction of the Indian tribal governments.[27] Because treaties with Indian nations were

[25] See, e.g., Treaty of September 9, 1849, United States-Navajo Tribe, 9 Stat. 974; Treaty of June 1, 1868, United States-Navajo Tribe, 15 Stat. 667.

[26] E.g., the Indian Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified as carried forward and amended in 25 U.S.C. § 177), made applicable in Arizona by the Act of February 27, 1851, ch. 14, § 7, 9 Stat. 574, 587.

[27] *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174-75 (1973) (construing the 1868 Navajo Treaty); *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347-348 (1941); *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515, 555, 556-557, 559-561, 581-582 (1832); *The Seneca Lands*, 1 Op.Atty.Gen. 465, 467 (1821).

written in a language foreign to the Indian people,[28] long-standing canons of construction require that these English-language treaties be construed as the Indian people themselves understood them,[29] that they be given a liberal interpretation,[30] and that ambiguous expressions be resolved in favor of the Indians.[31]

The United States has a trust obligation to American Indian tribes based upon the relationships established in these treaties, the Indian Commerce Clause of the United States Constitution,[32] which vests exclusive authority over Indian affairs in the United States Congress, and federal laws enacted pursuant to such federal congressional authority. This Court repeatedly has acted to uphold and protect the sovereignty of Indian nations, particularly the authority of Indian tribal governments to govern their lands and people free from state interference.[33] Federal law and policy strongly support the

[28] "That's what our treaties were. Pieces of paper written in a language we didn't understand and read to us by people we didn't trust." Kent Nerburn, *Neither Wolf Nor Dog*, New World Library (1994), at 139.

[29] *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) at 581-582.

[30] *Antoine v. Washington*, 420 U.S. 194, 200 (1975); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

[31] *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973); *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

[32] Art. I, § 8, Cl. 3.

[33] E.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973); *Warren Trading*

exercise of inherent sovereign powers of self-government of Indian people by their elected tribal governments, including the preservation of tribal history, culture, religion, and language.[34]

Article XXVIII violates the First Amendment to the United States Constitution, by impairing the right of Indian people to exercise protected speech. It acts to deprive American Indian people in Arizona of the ability to preserve and protect the indigenous languages upon which their tribal cultures, religion and traditions depend. In addition, Article XXVIII violates the Fourteenth Amendment to the United States Constitution, by discriminating against American Indian people in Arizona based upon national origin.

Article XXVIII has the effect of frustrating the strong federal policy supporting preservation of tribal governments, cultures, and languages. As a result, Article XXVIII violates the treaties between the United States and Indian nations and the federal legislation implementing those treaties.

Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959).

[34] Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479; Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341; Indian Self-Determination and Education Act of 1975, 25 U.S.C. §§ 450-450n; American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978); Bilingual Education Act of 1978, 25 U.S.C. §§ 3221-3261; Native American Languages Act of 1990, 25 U.S.C. §§ 2901-2906 (1990); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 106 L.Ed. 343, 369 n.3 (1989).

Article XXVIII results in less effective, more oppressive State government, which specifically, unfairly and unlawfully negatively impacts American Indian people in Arizona. Thus, the decision of the Ninth Circuit Court of Appeals that Article XXVIII is unconstitutionally overbroad should be affirmed.

ARGUMENT

I. ARTICLE XXVIII VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION BY UNLAWFULLY IMPAIRING THE FREE SPEECH INTERESTS OF THE NAVAJO NATION, OTHER INDIGENOUS AMERICAN INDIAN NATIONS, AND OTHER NATIONAL ORIGIN GROUPS IN ARIZONA

Nothing less than the right to speak in an indigenous tongue is at stake in this case. Article XXVIII seeks to deny that right to the indigenous people of Arizona, and to their sovereign Indian governments by commanding the use of English.[35] In hundreds of State offices and public schools located within the Navajo Nation, Navajo employees are prohibited from speaking to Navajo constituents, students and their families in the Navajo language. It could not be more obvious that the denial of such speech is a profound violation of the free speech

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[35] Article XXVIII unlawfully impairs the free speech interests of a significant portion of the indigenous population served by the State. According to the 1990 U.S. Census, there are 203,527 indigenous natives in Arizona who are age 18 and older, comprising nearly 6% of the State's voting population.

interests of the Navajo people. Such singling out of languages unique to national origin groups in Arizona is unlawfully overbroad, in violation of both the First and Fourteenth Amendments of the United States Constitution.

Scenario One: Arizona State office located in the Navajo Nation, where State employee who is a Navajo speaker cannot explain state benefits in the Navajo language to elderly Navajos in need of state services.

Scenario Two: In an Arizona public school located in the Navajo Nation, a history teacher who is a Navajo speaker cannot explain Navajo history to Navajo students in the Navajo language.

Scenario Three: An Arizona public school teacher or administrator who is a Navajo speaker cannot speak in Navajo to parents or grandparents of a Navajo student with troubled behavior.

Scenario Four: An elected state official who is Navajo with a majority Navajo constituency cannot speak in Navajo to his own constituents.

Scenario Five: The Navajo Nation cannot use the Navajo language when explaining to members of the Navajo Nation the state (and federal) benefits available as a result of a contract to provide services.

In each of these scenarios the State message is inevitably bound to be "garbled and distorted," the exact opposite result claimed by Petitioners. Efficiency, effectiveness, accuracy and the preservation of unity are sacrificed, ultimately resulting in the destruction of diversity and the mediocritization of America.

Historically, the Navajo language is an oral language, with the first Navajo orthography developed in the late 1880s.[36] Because many Navajos do not read or write the Navajo language, the Navajo Nation is not seeking the written publication of State documents in Navajo. It is the overbroad (absolute) denial of oral Navajo discussions by elected officials and employees of State services and the ability to use the Navajo language as a medium of instruction in public schools throughout the Navajo Nation as well as in neighboring communities which inflict irreparable harm.

The Navajo Nation is unquestionably harmed by Article XXVIII's suppression of the right of employees of the State to utilize languages other than English in providing services to its citizens. And when denial of such speech takes place on lands reserved by treaties which protect tribal self-determination, federal policies are also implicated.

II. ARTICLE XXVIII VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY UNLAWFULLY DISCRIMINATING AGAINST THE NAVAJO NATION, OTHER AMERICAN INDIAN NATIONS AND OTHER NATIONAL ORIGIN GROUPS

Article XXVIII violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides that "(n)o state shall . . . deny to any

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[36] Louise Lockard, "New Paper Words: Historical Images of Navajo Language Literacy," 19(1) Am. Indian Q. 17, at 21 (Winter 1995).

person within its jurisdiction the equal protection of the laws." That command is violated when a state's constitution renders some persons ineligible for "the . . . protection of the laws" from an entire category of harm. Here, the State's constitution absolutely precludes the usage of indigenous languages in "all government functions and actions." The harm is the impending loss, not only of indigenous languages, but the culture, custom and traditions which form the foundations of American Indian tribal governments and which depend upon the languages for their very definition. Arizona has set apart American Indian tribes and other national origin groups by declaring that **only English** may be used by employees of the State when conducting State business.

A. Protection of culture

Article XXVIII forbids Navajo teachers in the 33 public schools (with a majority of Navajo students) located on the Navajo Reservation or in public schools in nearby communities from speaking to Navajo students, and their families, in the Navajo language, **except** (1) when teaching Navajo as a "foreign" language or (2) as a tool for teaching English. As noted above, two-thirds of all Navajo students are in these public schools.[37]

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[37] The Johnson-O'Malley Act of 1934, 25 U.S.C. §§ 452-454, authorized the federal government to contract with states for, the education of American Indians, *inter alia*. Since Article XXVIII doesn't interfere with federal programs, American Indian students attending public schools may receive more training in native culture and language because tribal governments require this type of teaching.

In 1990, Congress found that, "there is convincing evidence that student achievement and performance, community and school pride, and educational opportunity is clearly and directly tied to respect for, and support of, the first language of the child or student[,]" and declared it the policy of the United States to, "encourage and support the use of Native American languages as a **medium** of instruction."[38] (Emphasis added.) Article XXVIII clearly violates this federal policy and unlawfully discriminates against the Fourteenth Amendment rights of the Navajo people.

Article XXVIII denies the Navajo Nation the right to implement its own educational law and policy to preserve and protect Navajo culture by utilizing the Navajo language in all schools located within the Navajo Nation's jurisdiction. Implementation of Tribal law and policy is particularly important because of an erosion of Navajo language skills in the younger generations.[39]

B. Provision of services

Article XXVIII forbids Navajo employees of the State from speaking to Navajo people in the Navajo language. In State offices located throughout the Navajo Nation and in nearby communities, the result is either the ineffective provision of services, or a denial of services altogether to monolingual members of the Navajo Nation, and those

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[38] 25 U.S.C. § 2901(6), § 2903(3).

[39] James Crawford, "Endangered Native American Languages: What Needs to Be Done, and Why?" 19 Bilingual Research J. 17-38 (Winter 1995).

with limited proficiency in English. Those most likely to be harmed are often the ones most likely to be in need of State services: Navajo elders.

Article XXVIII forbids the Navajo Nation, when acting as an agent of the State for the provision of federal or state services, from using the Navajo language in communications with its own citizens. Tribal governments are singled out as the only governmental entities in Arizona denied the use of their own indigenous languages in providing these services.

One of the most insidious effects which the Article XXVIII may have in Arizona is the impact on services provided by tribal governments through contracts with the State of Arizona. There are Arizona programs, funded by state and federal funds, which tribes contract to provide to their members. The Navajo Nation has several such contracts with Arizona, particularly in the health and human services areas.[40]

The main reason for tribal governments to contract with the State to offer this assistance is to provide more effective, culturally relevant services. The key to providing these services more effectively is through the use of the native language. As has been stated, many Navajos, particularly the elderly, are not fluent in English; their primary communications are in Navajo. To effectively receive any assistance offered by the State, the services,

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[40] Such programs include: Title III of the Older Americans Act, 42 U.S.C. § 3021, *et seq.*: Title XIX of the Social Security Act (long-term care, serious mental illness, and developmentally disabled services); and Jobs Training Partnership Act programs, 29 U.S.C. § 1501, *et seq.*, for employment and training.

including a determination of eligibility,[41] must be explained and delivered in Navajo. The elimination of Navajo as a language through which services may be delivered, eliminates any opportunity for these persons to receive the same State services accessible to those speaking English, in contravention of the Fourteenth Amendment to the United States Constitution.

Not only are individuals speaking primarily Navajo further disenfranchised, but governments, like the Navajo Nation are put at risk because of the attempt to make State-provided services more culturally relevant, and thereby more effective. For the programs which the Navajo Nation contracts with the State, the Nation takes on the responsibility to deliver these services. While each of these contracts specifies that the Navajo Nation is an independent contractor, the State remains ultimately liable under equal protection theories for this assistance.

So it is likely that if this constitutional provision is upheld that the Navajo Nation may be required to deliver services in English through either agency theories or simply because certain elements of the State government

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[41] In fact, the Navajo Nation has contracted to fund counties to hire Navajo speakers to assist in determining eligibility for Arizona programs, particularly those offered by AHCCCS (the State medicaid program) since under Arizona law, counties may make this determination. Although the constitutional provisions challenged exclude both the protection of public health and compliance with federal laws, it is not at all clear that these exclusions would apply, since State funds match the federal dollars to be expended and, in any event, eligibility determinations do not directly or necessarily impact on the receipt of medical services.

may feel constrained to force, as a contract term, the use of English. This will eliminate any effective service delivery to the Navajo people, resulting in unlawful discrimination on the basis of national origin in violation of the Fourteenth Amendment.

III. ARTICLE XXVIII IS PREEMPTED BY FEDERAL LAW BECAUSE IT CONFLICTS WITH THE NAVAJO PEOPLE'S RIGHT TO SELF-GOVERNMENT, PROTECTED UNDER THE NAVAJO TREATIES AND APPLICABLE FEDERAL LEGISLATION AND POLICY.

The Proclamation of 1763 by King George III of England was the precursor of historic preference for the exercise of federal authority in the field of Indian affairs. 25 U.S.C. § 177. Early Supreme Court cases consistently held that state jurisdiction was lacking where Indian interests were implicated.[42]

Recent history reflects a continuation of federal preemption policy in Indian country where tribal sovereignty is threatened by state incursions.[43] As th Court

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[42] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866).

[43] "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olsen*, 324 U.S. 786, 789 (1945)). "[B]road preemption of state laws in Indian country has been consistently recognized as a necessary implication from the federal policy protecting tribal sovereignty." F. Cohen at 273.

often has explained, congressional legislative authority under the Indian Commerce Clause, "and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers" to the exercise of state jurisdiction within Indian country. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

> First, the exercise of such authority may be preempted by federal law. . . . Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."

Ibid. (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959) (citations omitted)).

> Federal treaties and statutes have been consistently construed to reserve the right of self-government to the tribes, and the Supreme Court has held that this 'tradition of sovereignty' is the 'backdrop against which the applicable treaties and federal statutes must be read.'

Cohen at 273 (citing to *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 172-73 (1973)). Thus, reading the 1868 Navajo Treaty in accordance with applicable canons of treaty construction, "together with the tradition of Indian independence[,]" this Court has held that

> it cannot be doubted that the reservation of certain lands for the exclusive use of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision.

McClanahan, 411 U.S. at 174-175.

In this case, it is the very heart of tribal sovereignty which is at risk. Article XXVIII threatens the survival of American Indian nations by crippling tribal capability to speak their indigenous languages and to preserve, and protect their use. This is particularly onerous in the field of American Indian education, where federal regulation is both "comprehensive and pervasive,"[44] and thus clearly preempts State power.

American Indians are keenly aware of the necessity of linguistic self-determination as an integral aspect of survival. In 1990, when the Native American Languages Act was enacted, Congress found that, "**languages are the means of communication for the full range of human experiences and are critical to the survival of cultural and political integrity of any people**[.]"[45] (Emphasis added.) The Navajo Nation's right to self-government is impermissibly impaired by Article XXVIII, a right which is protected under the Navajo treaties with the United States and applicable federal legislation and policy. Thus, Arizona's authority to forbid the use of the Navajo language is preempted by federal law.

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[44] See *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 839 (1982), finding subject matter preemption in the field of education.

[45] 25 U.S.C. § 2901(9).

CONCLUSION

For the foregoing reasons, the Navajo Nation urges this Court to affirm the judgment below.

Respectfully submitted,

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